

Henry, DeGraaff, & McCormick, P.S.

May 31, 2014

Clerk of the Court
US Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103

Re: Citation of Supplemental Authorities
Rupanjali Snowden v. Check Into Cash of Washington, Inc., No. 13-35291 & 13-35322

Dear Clerk:

Pursuant to FRAP 28(j) and Circuit Rule 28-6, Snowden has learned of two pertinent and relevant authorities regarding the award of attorneys' fees under 11 USC § 105(a) for violations of the automatic stay. *See* Br. of Appellant at 40-41, 43-47.

In *Law v. Siegel*, 134 S.Ct. 1188 (2014), the Supreme Court ruled that bankruptcy courts cannot use § 105(a) to impose sanctions that are “specifically prohibited” by other sections of the Code. However, this decision does not preclude the use of § 105(a) to award attorneys' fees that cannot be awarded under § 362(k) as interpreted by *Sternberg v. Johnston*, 595 F.3d 397 (9th Cir. 2010).

Law's holding relies on the fact that the remedy ordered by the bankruptcy court—revocation of the homestead exemption of a fraudulent debtor—is specifically prohibited by § 522 of the Code. Under § 522, “exempt property ‘is not liable’ for the payment of ‘any [prepetition] debt’ or ‘any administrative expense.’” *Law*, slip op. at 2 (citing 11 U.S.C. § 522(c), (k)) (alteration in original). The Court repeatedly emphasizes the specificity of this

prohibition in concluding that it precludes sanction under § 105(a). *Id.*, slip op. at 2, 5–8 *passim*, 11, 12.

Section 362(k) contains no specific prohibitions: it is a permissive statute. Even under the narrow reading preferred by *Sternberg*, there is no language in § 362(k) that can reasonably be construed as specifically prohibiting additional relief under § 105(a) or any other provision of the Code.

In re Kutumian, No. 13-14675-13-7 (Bankr. E.D. Cal. May 15, 2014), comes to the opposite conclusion, interpreting *Sternberg* and *Law* as limiting the availability of attorneys’ fees under § 105(a). Yet *Kutumian* also draws attention to § 362(k)’s legislative history, which suggests that it was “not intended to foreclose recovery under already existing remedies.” *Kutumian* at 16 (citing 130 Cong. Rec. H1942 (daily ed. Mar. 26, 1984) (statement of Rep. Rodino)). Given this, the lack of any specific prohibition in § 362(k) is especially important as an indication that it does not preclude any additional award of attorneys’ fees under *Law*.

Very Truly Yours,

s/ Christina L. Henry

Christina L. Henry

CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2014, I electronically filed the Appellant *Rupanjali Snowden's Letter of Supplemental Citation dated May 31, 2014 with Exhibit A* using the CM/ECF System which will send notification of such filing to the below counsel of record.

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I certify under the laws of the United States that the above statement is true and correct.

DATED this 31st day of May, 2014.

/s/ Christina L. Henry
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EXHIBIT A

POSTED ON WEBSITE

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

In re)	Case No. 13-14675-B-7
)	
Jerry Harry Kutumian,)	DC No. KDG-2
)	
Debtor.)	

**MEMORANDUM DECISION REGARDING DEBTOR'S
MOTION FOR DAMAGES BASED ON VIOLATION OF THE
AUTOMATIC STAY AND SANCTIONS FOR CONTEMPT**

Connie M. Parker, Esq., of Klein, DeNatale, Goldner, et al., LLP, appeared on behalf of the debtor Jerry Harry Kutumian.

George A. Gonzalez, Esq., appeared on behalf of respondents Mitchell S. Golub, Esq. and the Law Offices of Golub & Associates, PLC.

Before the court is a motion filed by the debtor Jerry Harry Kutumian (the "Debtor") seeking damages under 11 U.S.C. § 362(k)(1)¹ and civil contempt sanctions under § 105(a) against attorney Mitchell S. Golub, Esq., and the Law Offices of Golub & Associates, PLC (collectively "Golub") for their willful violation of the automatic stay (the "Motion"). The court has already determined that a willful violation occurred and it has since been corrected. Rather, this dispute revolves around the appropriate amount of damages, specifically attorney's fees and costs, that the Debtor can recover as a result of the violation. The Debtor requests \$4,366 in attorney's fees and \$75.05 in costs. Golub contends that the award should not exceed \$1,000. For the reasons set forth below, the court will award the Debtor his actual damages under § 362(k)(1) in the amount of \$3,408.55, representing attorney's fees

¹ Unless otherwise indicated, all chapter, section, and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101–1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001–9036, as enacted and promulgated *after* October 17, 2005, the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005, Pub. L. No. 109-8, 119 Stat. 23.

1 and costs incurred prior to termination of the stay violation. The Debtor's request for
2 an award of additional fees as a contempt sanction under § 105(a) will be denied.

3 This memorandum decision contains the court's findings of fact and
4 conclusions of law required by Federal Rule of Civil Procedure 52(a), made
5 applicable to this contested matter by Federal Rules of Bankruptcy Procedure 7052
6 and 9014(c). The court has jurisdiction over this matter under 28 U.S.C. § 1334, 11
7 U.S.C. §§ 105 and 362, and General Order Nos. 182 and 330 of the U.S. District
8 Court for the Eastern District of California. This is a core proceeding pursuant to 28
9 U.S.C. § 157(b)(2)(A).

10 **Background and Findings of Fact.**

11 The Debtor, an individual, is a building contractor who was involved in the
12 construction and sale of residences located in a planned development known as
13 Summit Ranch. Prior to his bankruptcy, the Debtor, along with other entities, had
14 been sued in state court by various Summit Ranch homeowners for alleged
15 construction defects (the "First Civil Action").² The plaintiffs in the First Civil
16 Action were represented by Golub. When this chapter 7 bankruptcy commenced on
17 July 3, 2013, the First Civil Action was stayed. In his schedules, the Debtor listed the
18 homeowners from the First Civil Action as creditors, using Golub's address for
19 notice. Thus, Golub received notice of the bankruptcy case, the meeting of creditors,
20 and the deadlines for taking certain actions against the Debtor.

21 Not only did Golub know of the Debtor's bankruptcy, but Golub even
22 participated in some of the bankruptcy proceedings. On August 9, 2013, Golub filed
23 a notice of appearance and request for special notice on behalf of the homeowners.
24 Three days later, Golub appeared at the meeting of creditors and questioned the
25 Debtor regarding potential insurance coverage for the Summit Ranch development.

26
27 ² The First Civil Action included causes of action for strict liability, negligence,
28 nuisance, breach of warranty, negligent failure to disclose misrepresentation, and negligent
infliction of emotional distress.

1 Golub also filed an adversary proceeding against the Debtor on October 11 seeking to
2 deny his discharge under § 727 or to alternatively except the homeowners' claims
3 from discharge under § 523 (the "Adversary Proceeding"). Lastly, on October 24,
4 Golub filed an objection to the chapter 7 trustee's report of no distribution and, on
5 December 4, appeared at the hearing on that matter.

6 On December 31, 2013, while this bankruptcy case was still pending, before
7 entry of the Debtor's discharge,³ and while the automatic stay was still in effect,
8 Golub filed a second construction defect action against the Debtor and other entities
9 in state court on behalf of seventeen different Summit Ranch homeowners (the
10 "Second Civil Action"). The complaint in the Second Civil Action involved new
11 plaintiffs but was based on many of the same causes of action alleged in the First
12 Civil Action. Golub was aware of the automatic stay when it filed the Second Civil
13 Action but believed (erroneously) that the claims pleaded in the Second Civil Action
14 did not arise until after commencement of the Debtor's bankruptcy.⁴ While the
15 Debtor was named as a defendant in the Second Civil Action, there is no evidence to
16 suggest that the Debtor was ever served with the summons or complaint.

17 On January 3, 2014, the Debtor's counsel, Connie Parker ("Parker"), learned
18 of the Second Civil Action and immediately sent a demand letter to attorney Mitchell
19 Golub reminding him that the Second Civil Action violated the automatic stay and
20 requesting a dismissal of the Debtor not later than January 10. Golub apparently
21

22 ³ Golub's adversary proceeding delayed the entry of a discharge in this case. The
23 objection to discharge claim for relief was dismissed with prejudice on April 11, 2014, and
24 the Debtor's general discharge was entered on April 14, 2014. The automatic stay
terminated as to the Debtor at that time and was replaced by the discharge injunction.

25 ⁴ The plaintiffs in the Second Civil Action all purchased their homes before
26 commencement of the bankruptcy. However, Golub's first argument in opposition to the
27 Motion was based on Golub's contention that the various construction defects underlying the
28 Second Civil Action were not *discovered* until after commencement of the bankruptcy, that
they were therefore "postpetition claims," and that the automatic stay did not apply. The
court rejected Golub's "postpetition claim" argument for reasons stated on the record at the
hearing, so it will not be discussed here.

1 received the letter around January 9 but made no effort to respond to Parker.⁵ While
2 Parker awaited Golub's response, she periodically checked the state court's docket to
3 see if the status of the Second Civil Action had changed. On January 21, almost three
4 weeks after sending the letter to Golub, and still having received no response or seen
5 any change in the status of the Second Civil Action, Parker began preparing the
6 Motion. It was completed the next day, but was not actually filed and served until
7 January 28.

8 Meanwhile, in the Adversary Proceeding, Parker filed a status conference
9 statement on January 24, which advised the court that Golub had filed the Second
10 Civil Action against the Debtor in violation of the automatic stay. The statement also
11 declared Parker's intent to file the Motion shortly thereafter. Golub's responsive
12 status conference statement, filed three days later, announced for the first time that
13 Golub was in the process of dismissing the Debtor from the Second Civil Action.

14 On or about that same day, January 27, Golub submitted a request to the state
15 court for dismissal of the Debtor from the Second Civil Action. The next day, Golub
16 called Parker and informed her that the request for dismissal had been transmitted to
17 the state court and that Golub was simply waiting for the state court to return a
18 conformed copy. However, the record does not show that Golub provided Parker
19 with a copy of the dismissal request, and the state court did not enter the dismissal on
20 its docket until January 31, 2014. At that point, Golub's violation of the automatic
21 stay terminated, and there was nothing else Golub needed to do to correct the error.

22 After finally receiving a call from Golub regarding its intent to dismiss the
23 Second Civil Action, but having not yet received a copy of the dismissal request and

24
25 ⁵ At that time, both attorneys Mitchell Golub and George Gonzalez were undergoing
26 personal and family issues that "prevented them from immediately addressing [Parker's]
27 demand," and Golub's response simply states that these issues occurred in "early January."
28 Opp'n to Debtor's Mot. for Order for Contempt 6:4-8, Feb. 26, 2014, ECF No. 50. It does
not address the exact timing of these issues in relationship to Parker's demand letter, and it
does not adequately explain why Parker received no response once the attorneys were able
to return to their cases.

1 not seeing that the Second Civil Action was actually dismissed, Parker proceeded to
2 file the Motion with this court on January 28. The Motion prays for \$4,366 in
3 attorney's fees and \$75.05 in costs as part of either the damages recoverable under
4 § 362(k)(1) and/or an award of contempt sanctions under § 105(a).⁶

5 In support of the Motion, Parker attached copies of her billing records which
6 revealed seventeen time entries for 14.8 hours of work billed at \$295 an hour. First,
7 seven billing entries, totaling only 1.8 hours and \$531 in fees, cover a range of
8 Parker's tasks, including drafting the demand letter, communicating with the Debtor
9 about the Second Civil Action, reviewing the Second Civil Action's complaint and
10 docket, and drafting a notice of the automatic stay to be filed in the Second Civil
11 Action. Then, there are eight entries that represent the bulk of the requested
12 attorney's fees—9.5 hours of work resulting in fees of \$2,802.50—relating to
13 preparation of the Motion on January 21 and 22. Lastly, Parker includes two "future"
14 time entries that total 3.5 hours and \$1,032.50 in fees. They represent the anticipated
15 fees for reviewing Golub's opposition to the Motion, drafting the responsive reply
16 brief, and appearing at the hearing on the Motion.

17 **Discussion and Conclusions of Law.**

18 Willful Violation of the Automatic Stay. There is no question that Golub's
19 filing of the Second Civil Action violated the automatic stay. *See* § 362(a)(1) (staying
20 "the commencement or continuation . . . of a judicial, administrative, or other action
21 or proceeding against the debtor that was or could have been commenced before the
22 commencement of the case under this title"); *see also supra* note 4 (regarding Golub's
23 "postpetition claim" argument).

24 Further, there is no question that the stay violation was a willful act. "A
25

26 ⁶ Since, at the time of the Motion's filing, the stay violation had not yet been
27 formally remedied, the Debtor also requested in the Motion that Golub be sanctioned \$100 a
28 day until the Debtor was dismissed from the Second Civil Action. However, by the March
12 hearing on the Motion, the Debtor had already been dismissed. As a result, this issue is
moot, and the court has no need to address this request.

1 willful violation is satisfied if a party knew of the automatic stay, and its actions in
2 violation of the stay were intentional.” *Eskanos & Adler, P.C. v. Leetien*, 309 F.3d
3 1210, 1215 (9th Cir. 2002). As to the first element, Golub knew of the automatic
4 stay, which is evidenced by its notice of and participation in the bankruptcy case. *See*
5 *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1191 (9th Cir. 2003) (noting that
6 “a party with knowledge of bankruptcy proceedings is charged with knowledge of the
7 automatic stay” for § 362(k)(1) purposes); *Ozenne v. Bendon (In re Ozenne)*, 337
8 B.R. 214, 220 (9th Cir. BAP 2006) (“Knowledge of the bankruptcy filing is the legal
9 equivalent of knowledge of the automatic stay.”). As to the second element, the
10 preparation and filing of the Second Civil Action was totally within Golub’s control
11 and can only be characterized as an intentional, voluntary act.

12 Actual Damages under § 362(k)(1). Because Golub has willfully violated the
13 automatic stay, the court now turns to the issue of the Debtor’s damages. Under
14 § 362(k)(1), “an individual injured by any willful violation of [the automatic stay]
15 shall recover actual damages, including costs and attorneys’ fees, and in appropriate
16 circumstances, may recover punitive damages.” The language of the statute gives the
17 court little discretion with regard to awarding some amount of damages. “The words
18 ‘shall recover’ indicate that Congress intended that the award of actual damages, costs
19 and attorney’s fees be mandatory upon a finding of a willful violation of the stay.”
20 *Ramirez v. Fuselier (In re Ramirez)*, 183 B.R. 583, 589 (9th Cir. BAP 1995).

21 Here, the Debtor has not offered any evidence of, nor prayed for, any damages
22 arising out of the stay violation other than his attorney’s fees and costs. However, the
23 parties disagree on the amount of attorney’s fees that can be properly awarded. The
24 Debtor prays for \$4,366 in fees and \$75.05 in costs, while Golub urges that the award
25 not exceed \$1,000. However, neither number represents the appropriate result.

26 The Sternberg Limitation. The issue of what attorney’s fees are generally
27 appropriate in a § 362(k)(1) award was addressed by the Ninth Circuit in *Sternberg v.*
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1 *Johnston*, 595 F.3d 397 (2010). Prior to *Sternberg*, the BAP had permitted individual
2 debtors to recover all “[a]ttorneys’ fees incurred as a result of a violation of the
3 automatic stay,” including “the attorney’s fees and costs incurred in prosecuting an
4 adversary proceeding seeking damages arising from a violation of the automatic
5 stay,” as a part of their “actual damages” under § 362(k)(1). *Havelock v. Taxel (In re*
6 *Pace)*, 159 B.R. 890, 900–01 (9th Cir. BAP 1993), *vacated in part on other grounds*,
7 67 F.3d 187 (9th Cir. 1995). However, the Ninth Circuit in *Sternberg* rejected that
8 result based on the “American Rule” regarding the recovery of attorney’s fees. It
9 significantly limited the remedy available under § 362(k)(1), holding that the award
10 of “actual damages” can include “only those attorney fees related to enforcing the
11 automatic stay and remedying the stay violation,” but not the fees incurred in
12 prosecuting the damage action itself. 595 F.3d at 940. “Without a doubt, Congress
13 intended § 362(k)(1) to permit [only] recovery as damages of fees incurred to prevent
14 violation of the automatic stay.” *Id.* at 946.

15 The distinction between those attorney’s fees incurred to enforce the stay and
16 remedy the stay violation and those incurred to prosecute a § 362(k)(1) damages
17 claim is not always a clear line. *See, e.g., Am.’s Servicing Co. v. Schwartz-Tallard (In*
18 *re Schwartz-Tallard)*, --- F.3d ---, No. 12-60052, 2014 WL 1465698, at *4–10 (9th
19 Cir. Apr. 16, 2014) (Wallace, J., dissenting) (disagreeing with majority over whether
20 the debtor could recover attorney’s fees incurred in defending the appeal of a finding
21 of a stay violation). Yet, in an attempt to simplify the analysis, the Ninth Circuit in
22 *Sternberg* has given us a “bright line” which is applicable here: “Once the [stay]
23 violation has ended, any fees the debtor incurs after that point in pursuit of a damage
24 award would not be to compensate for ‘actual damages’ under § 362(k)(1).” 595 F.3d
25 at 947. *But see Schwartz-Tallard*, 2014 WL 1465698, at *7 (Wallace, J., dissenting)
26 (noting that majority did not follow *Sternberg*’s instruction).

27 As a result, the court must determine when Golub’s stay violation actually
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1 terminated because, under *Sternberg*, that is the operative date after which the
2 Debtor's right to recover attorney's fees under § 362(k)(1) also terminated. Here,
3 Golub submitted its request for dismissal to the state court on or about January 27,
4 2014, but the state court did not actually enter the dismissal until January 31. Thus,
5 the stay violation did not cease until January 31, 2014, and the Debtor should be
6 entitled to recover his reasonable attorney's fees incurred up until that date.

7 Golub argues for a further reduction of the attorney's fees, contending that
8 some of Parker's work between January 3 and 22 related solely to prosecution of the
9 § 362(k)(1) damages action, which cannot be counted as "damages" under *Sternberg*.
10 Indeed, eight billing entries from January 21 to 22, which total \$2,802.50, relate to
11 preparation of the Motion and could, as Golub argues, be considered "pursuit of a
12 damage award." *Sternberg*, 595 F.3d at 947. The court disagrees. As the facts of this
13 case illustrate, the legal services necessary to remedy a stay violation can often
14 overlap those necessary to recover damages, and until the stay violation terminates,
15 those legal services can fall into both categories.

16 Golub disregards the Ninth Circuit's instruction, recited above, that "[o]nce the
17 [stay] violation has ended, any fees the debtor incurs after that point in pursuit of a
18 damage award would not be to compensate for 'actual damages' under § 362(k)(1)."
19 *Id.* By inverse, before the stay violation has ended, the attorney's fees incurred by the
20 debtor, even if somewhat related to the "pursuit of a damage award," may also be
21 categorized as part of the actual damages under § 362(k)(1) if they are reasonably
22 related to correcting the violation.

23 As the Ninth Circuit noted, the actual damages awarded under § 362(k)(1) are
24 intended to compensate for the "injury resulting from the stay violation itself." *Id.*
25 As long as the stay violation continues, the injury to the debtor continues, and the
26 reasonable costs for bringing an end to the stay violation continue to be part of that
27 injury. How a debtor seeks to remedy the stay violation will change depending on the
28

1 circumstances. Sometimes, a simple demand letter or phone call to the party violating
2 the stay is sufficient to convince that party to end its stay violation. That remedy was
3 tried but did not work here. At other times, the formal request for damages in a
4 motion or complaint filed with the court becomes a necessary tool of persuasion
5 against the violating party. Certainly, a motion for compensatory damages would
6 have more “teeth” than the seemingly empty threat to seek damages in a demand
7 letter, especially when the offending party has not otherwise responded to the letter.

8 Such is the case here. After waiting nineteen days with no response from
9 Golub, Parker reasonably concluded that the only tool the Debtor had to force
10 Golub’s response and gain a dismissal from the Second Civil Action was to pursue
11 the Motion. Even though the Motion requests damages under § 362(k)(1), the very
12 existence of the Motion was also instrumental in bringing an end to the stay violation.
13 The court notes that the Motion not only prays for damages but also requests the
14 imposition of daily sanctions until Golub actually complied with the automatic stay.
15 Golub did not begin the process of curing the stay violation until after Parker
16 mentioned the forthcoming Motion in the Adversary Proceeding’s status conference
17 statement on January 24. On these facts, the court is not persuaded that the fees
18 incurred to prepare and file the Motion were not properly “attorney fees related to
19 enforcing the automatic stay and remedying the stay violation.” *Id.* at 940.

20 Failure to Mitigate. Additionally, Golub argues that Parker failed to mitigate
21 the damages by generating excessive fees. The attorney’s fees requested under
22 § 362(k)(1) must be reasonable. *See Eskanos & Adler, P.C. v. Roman (In re Roman)*,
23 283 B.R. 1, 11 (9th Cir. BAP 2002) (endorsing use of § 330 principles as guide for
24 determining attorney’s fees in § 362(k)(1) context). “Generally, in determining the
25 appropriate amount of attorneys’ fees to award as a sanction, the court looks to two
26 factors: (1) what expenses or costs resulted from the violation and (2) what portion of
27 those costs was reasonable, as opposed to costs that could have been mitigated.” *Id.*

1 at 12.

2 Here, Golub contends that Parker unnecessarily moved forward with
3 preparation of the Motion after sending the demand letter on January 3, rather than
4 following up with Golub. Indeed, Golub complains that Parker only sent one letter
5 and then failed to “request an update on the dismissal.” Opp’n to Debtor’s Mot. for
6 Order for Contempt 8:19–28, Feb. 26, 2014, ECF No. 50. However, this argument
7 necessarily implies that Parker had some continuing duty to “follow up” and remind
8 Golub of its stay violation. Golub’s argument fails to acknowledge that it had an
9 affirmative duty to remedy the stay violation. *See Eskanos*, 309 F.3d at 1214–15; *see*
10 *also Dyer*, 322 F.3d at 1192; *cf. Abrams v. Sw. Leasing & Rental Inc. (In re Abrams)*,
11 127 B.R. 239, 244 (9th Cir. BAP 1991) (concluding that creditors’ continued
12 repossession of debtors’ car became willful stay violation when they “failed to take
13 any reasonable steps to remedy their violation upon learning of the debtors’
14 bankruptcy”). Golub could have easily responded to Parker with a simple phone call,
15 or perhaps even a letter, immediately after receiving her demand. If Golub’s two
16 responsible attorneys were unable to respond immediately, one of them certainly
17 could have responded to Parker within the three weeks that followed. It was not
18 entirely up to Parker to initiate the contact and pursue the remedy.

19 Parker’s actions were not unreasonable given Golub’s failure to respond to the
20 demand letter or otherwise communicate with Parker. Even if Golub did not receive
21 the demand letter until January 9, six days after it was mailed out, Golub made no
22 immediate attempt to contact Parker, even informally, about dismissing the Debtor
23 from the Second Civil Action. Parker waited nineteen days after mailing the demand
24 letter before she even started to work on the Motion. Golub waited until January 27
25 to first inform Parker, through a pleading it filed in another action, that a request for
26 dismissal would be forthcoming. Even then, Parker had nothing to verify that the
27 request for dismissal had actually been prepared and sent to the state court. By that
28

1 time, it was simply too late; Parker had completed the Motion and was ready to file it.
2 It is disingenuous for Golub to suggest that Parker acted improperly by filing the
3 Motion shortly after learning, informally and for the first time, that Golub now
4 intended to do what it should have already done.

5 For these reasons, the court will award the Debtor his actual damages under
6 § 362(k)(1) in the amount of \$3,408.55, which represents \$3,333.50 in attorney's fees
7 and \$75.05 in costs incurred prior to termination of the stay violation. The Debtor's
8 request for additional attorney's fees to review Golub's opposition, draft the reply,
9 and appear at the hearing—tasks that did not occur until after the stay violation
10 ended—cannot be awarded under § 362(k)(1) in accordance with *Sternberg*.

11 Civil Contempt Sanctions under § 105(a). The court now turns to the more
12 difficult part of the Motion, the Debtor's request for attorney's fees incurred after
13 January 31, i.e., when the stay violation terminated. As discussed above, attorney's
14 fees incurred after the Debtor was dismissed from the Second Civil Action cannot be
15 awarded under § 362(k)(1) and *Sternberg*. However, the Debtor argues that these
16 fees are recoverable as a civil contempt sanction under § 105(a).

17 The civil contempt remedy is not based on a specific statutory predicate like
18 the damages remedy provided in § 362(k)(1). In the absence of a statutory basis for
19 awarding additional attorney's fees to the Debtor, he is essentially asking the court to
20 exercise its general equitable powers under § 105(a), which states, in pertinent part,
21 "The court may issue any order, process, or judgment that is necessary or appropriate
22 to carry out the provisions of this title" In the Ninth Circuit, the civil contempt
23 remedy has been generally accepted as an exercise of the bankruptcy court's equitable
24 power under § 105(a). *See Dyer*, 322 F.3d at 1189–90 & n.13 (discussing history of
25 the civil contempt remedy within the Ninth Circuit).

26 Further, it has long been accepted in the Ninth Circuit that civil contempt
27 sanctions are available as a remedy for a violation of the automatic stay. *See Cal.*
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1 *Emp't Dev. Dep't v. Taxel (In re Del Mission Ltd.)*, 98 F.3d 1147, 1152 (9th Cir.
2 1996); *Havelock v. Taxel (In re Pace)*, 67 F.3d 187, 193 (9th Cir. 1995); *United*
3 *States v. Arkison (In re Cascade Roads, Inc.)*, 34 F.3d 756, 767 (9th Cir. 1994);
4 *Johnston Env'tl. Corp. v. Knight (In re Goodman)*, 991 F.2d 613, 620 (9th Cir. 1993).
5 Section 105(a) allows the entity who proves a willful stay violation to recover
6 "sanctions associated with civil contempt—that is, compensatory damages, attorney
7 fees, and the offending creditor's compliance." *Dyer*, 322 F.3d at 1193 (discharge
8 violation case). "[W]hile an award of damages under section [362(k)(1)] is
9 mandatory, an award of damages under section 105(a) is discretionary." *Pace*, 67
10 F.3d at 193. Additionally, as distinguished from a § 362(k)(1) award, which is
11 limited by *Sternberg*, "a damages award under § 105(a) for a willful stay violation
12 may appropriately include attorneys' fees and costs incurred in pursuing damages for
13 the violation," i.e., fees incurred after the termination of the stay violation. *Rediger*
14 *Inv. Corp. v. H Granados Commc'ns, Inc. (In re H Granados Commc'ns, Inc.)*, 503
15 B.R. 726, 735 (9th Cir. BAP 2013).

16 The Debtor contends that the cited case authority unquestionably supports his
17 request for recovery of the attorney's fees incurred after the stay violation ended.
18 However, the injured parties in the cited cases were not "individuals" (i.e., natural
19 persons) entitled to relief under § 362(k)(1).⁷ The courts had to rely on § 105(a)'s
20 civil contempt authority to create a remedy for those non-individuals that had no other
21 available remedy. See *Del Mission*, 98 F.3d at 1152 (trustee); *Pace*, 67 F.3d at 193
22 (trustee); *Cascade Roads*, 34 F.3d at 766–67 (corporate debtor); *Goodman*, 991 F.2d
23 at 619–20 (corporate debtor); *H Granados Commc'ns*, 503 B.R. at 734 (corporate
24 debtor); cf. *Ramirez*, 183 B.R. at 589 (treating individuals' motion for contempt as a
25 request for damages under

27 ⁷ The Debtor has not cited a case where an injured individual was awarded contempt
28 sanctions under § 105(a).

1 § 362(k)(1).

2 This case though involves an individual, which makes § 362(k)(1) the
3 immediately applicable authority, and which also makes the above cited cases
4 distinguishable. Because those cases involved non-individuals, the courts never had
5 to address the individual debtor's right to recover damages under both §§ 362(k)(1)
6 and 105(a). Thus, those cases are not as applicable here as the Debtor suggests they
7 might be.

8 Nevertheless, the Ninth Circuit in *Sternberg*, after limiting the recovery of
9 "damages" under § 362(k)(1), suggested, in a footnote, that additional attorney's fees
10 may still be awarded as civil contempt sanctions:

11 The attorneys fee award against Sternberg was based on the
12 authority of this statute [§ 362(k)(1)]. The bankruptcy court did not
13 find Sternberg or anyone else to be in civil contempt for violating the
14 automatic stay, nor did it impose any sanctions under its inherent civil
15 contempt authority. As this opinion does not consider the civil
16 contempt authority of the court, it does not limit the availability of
17 contempt sanctions, including attorney fees, for violation of the
18 automatic stay, where otherwise appropriate.

19 595 F.3d at 946 n.3 (citation omitted). *Sternberg*, however, was decided before the
20 U.S. Supreme Court's recent decision in *Law v. Siegel*, 134 S. Ct. 1188 (2014), which
21 directly addresses the scope and application of § 105(a). In *Law*, the Supreme Court
22 significantly curtailed the bankruptcy courts' ability to utilize § 105(a) as a basis for
23 creating new remedies that are not otherwise available under the Bankruptcy Code
24 and, as applicable here, for circumventing the limitations of those remedies that are in
25 the Code.

26 In *Law*, the Supreme Court addressed the bankruptcy court's use of § 105(a) to
27 remedy an egregious case of bad faith conduct by the debtor in litigation of an
28 adversary proceeding. *See id.* at 1194–95. The Court acknowledged that, in addition
to the statutory power under § 105(a) to carry out the provisions of the Code, the
bankruptcy court "may also possess 'inherent power . . . to sanction abusive litigation

1 practices. *Id.* at 1194 (quoting *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365,
2 375–76 (2007)). The Court then admonished, “But in exercising those statutory and
3 inherent powers, a bankruptcy court may not contravene specific statutory provisions
4 Section 105(a) confers authority to ‘carry’ out the provisions of the Code, but it
5 is quite impossible to do that by taking action that the Code prohibits.” *Id.*

6 In the proceeding below, the Ninth Circuit had followed the precedent
7 established in *Latman v. Burdette (In re Latman)*, 366 F.3d 774 (9th Cir. 2004), a
8 decision now abrogated by *Law*. See *Law v. Siegel*, 435 F. App’x 697, 698 (9th Cir.
9 2011). The Ninth Circuit applied § 105(a) to bestow upon the bankruptcy court the
10 general equitable power to surcharge the debtor’s \$75,000 homestead exemption to
11 compensate the bankruptcy estate for over \$500,000 in administrative expenses
12 resulting from the debtor’s bad faith conduct. See *id.* In effect, this amounted to
13 disallowance of the debtor’s homestead exemption and use of that exemption to pay
14 administrative expenses.

15 The Supreme Court, however, rejected all of the arguments for such a remedy,
16 finding that surcharging an exemption contravened provisions in the Bankruptcy
17 Code and that there was also no statutory basis in the Code for allowing this equitable
18 surcharge. See *id.* at 1195–96. The Court noted that the surcharge conflicted
19 specifically with two subsections of § 522: § 522(b), which allows a debtor to exempt
20 property in the first place, and § 522(k), which expressly limits the use of exempt
21 property to pay for administrative expenses. See *id.* at 1195. And § 522, with its
22 “carefully calibrated exceptions and limitations,” did “not give courts discretion to
23 grant or withhold exemptions based on whatever considerations they deem
24 appropriate,” such as the debtor’s bad faith conduct. *Id.* at 1196. Further, outside of
25 § 522, the Court concluded that the Code did not admit “a general, equitable power in
26 bankruptcy courts to deny exemptions based on a debtor’s bad-faith conduct.” *Id.* at
27 1197. Thus, *Law* demands that the bankruptcy courts re-examine the traditional
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1 theories and assumptions upon which they have previously utilized § 105(a).

2 Returning now to the case before this court, when an individual is injured by a
3 violation of the automatic stay, that individual's ability to recover attorney's fees as a
4 contempt sanction under § 105(a) becomes a troubling issue due to the application of
5 § 362(k)(1) as limited by *Sternberg*. As *Law* cautions, "[§] 105(a) confers authority
6 to 'carry out' the provisions of the Code, but it is quite impossible to do that by taking
7 action that the Code prohibits." *Id.* at 1194. This presents the court with the
8 following question: Does the court's civil contempt authority under § 105(a)
9 "contravene[] a specific provision of the Code"—namely, § 362(k)(1)—when it is
10 used to allow an individual to recover the attorney's fees which *Sternberg* says are
11 otherwise unavailable under the Bankruptcy Code? *Id.* at 1195. If the answer is yes,
12 then pursuant to *Law*, an individual's right to recover attorney's fees as damages is
13 strictly limited to the fees allowed by § 362(k)(1) and *Sternberg*. If the answer is no,
14 then an individual can circumvent *Sternberg*'s limitation and recover attorney's fees
15 incurred in pursuing damages under § 105(a).

16 To answer this question, the court first looks to the history of how Congress, as
17 well as the courts, sought to help those injured by violations of the automatic stay.
18 Prior to the 2005 BAPCPA amendments, § 362(k)(1) had been designated § 362(h).
19 *See* BAPCPA, Pub. L. No. 109-8, §§ 305(1)(B), 441(1)(A), 119 Stat. at 79, 114. And
20 § 362(h), in turn, had been added to the Bankruptcy Code in 1984, creating a private
21 remedy for individuals injured by a stay violation. *See* Bankruptcy Amendments and
22 Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 304, 98 Stat. 333, 352. "Before
23 the enactment of § 362(h) in 1984, sanctions for violations of the automatic stay were
24 pursued in a civil contempt proceeding pursuant to the court's discretionary power
25 under § 105(a)." *Roman*, 283 B.R. at 14; *see, e.g., Superior Propane v. Zartun (In re*
26 *Zartun)*, 30 B.R. 543, 546 (9th Cir. BAP 1983) (citing additional cases); *Fid. Mortg.*
27 *Investors v. Camelia Builders, Inc. (In re Fid. Mortg. Investors)*, 550 F.2d 47, 50 (2d

1 Cir. 1976) (Bankruptcy Act case). Yet, “[t]he precise reason for the enactment of
2 [§ 362(h)] is not clear,” *Wagner v. Ivory (In re Wagner)*, 74 B.R. 898, 902 (Bankr.
3 E.D. Penn. 1987), so it is unknown whether § 362(h)’s enactment was intended to
4 limit, in any way, the contempt remedy relied upon by courts prior to 1984, at least
5 with regards to individuals injured by a stay violation.

6 Some courts have commented that “creation of an express right of action [in
7 § 362(h)] responded to widespread criticism of the need to rely on the contempt
8 power to remedy violations of § 362.” *Walls*, 276 F.3d at 509 (citing *Pertuso v. Ford*
9 *Motor Credit Co.*, 233 F.3d 417, 422 (6th Cir. 2000); Jeffrey A. Stoops, *Monetary*
10 *Awards to the Debtor for Violations of the Automatic Stay*, 11 Fla. St. U.L. Rev. 423,
11 439 (1983)). Apparently, prior to 1984, “[c]reditors argued that it was not possible to
12 be in ‘contempt’ of a rule of procedure or a statute as opposed to an order of a court.”
13 *United States v. Harchar*, 331 B.R. 720, 730 (N.D. Ohio 2005); accord *Peterson v.*
14 *Wells Fargo Bank, N.A.*, No. CV-99-6389 REC/SMS, 2000 WL 1225788, at *5 n.1
15 (E.D. Cal. Aug. 17, 2000) (providing that “use of the court’s contempt power to
16 remedy a violation of § 362 was criticized [because] [a] contempt proceeding under
17 § 362 is for a violation of the statute itself”). *But see Dyer*, 322 F.3d at 1191
18 (providing that “the automatic stay qualifies as a specific and definite order” such that
19 contempt sanctions can be imposed for stay violation). Thus, one could conclude that
20 § 362(h)’s introduction of a new statutory remedy called into question the continuing
21 viability of § 105(a) as an independent way to address essentially the same issue.

22 The scant relevant legislative history, however, suggests that § 362(h) was
23 introduced to provide “an additional right of individual debtors and [was] not
24 intended to foreclose recovery under already existing remedies.” 130 Cong. Rec.
25 H1942 (daily ed. Mar. 26, 1984) (statement of Rep. Rodino). Relying on this
26 comment in the congressional record, some courts have interpreted § 362(h) to mean
27 that “Congress did not intend to abrogate the right to seek civil contempt, the remedy
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1 traditionally available to aggrieved debtors for violations of the automatic stay.”
2 *Wagner v. Ivory (In re Wagner)*, 74 B.R. 898, 903 (Bankr. E.D. Penn. 1987); *accord*
3 *Ga. Scale Co. v. Toledo Scale Corp. (In re Ga. Scale Co.)*, 134 B.R. 69, 72–73
4 (Bankr. S.D. Ga. 1991). Rather, § 362(h)’s introduction “was meant to supplement,
5 not replace, the civil contempt remedy.” *Wagner*, 74 B.R. at 902; *In re Sharon*, 200
6 B.R. 181, 200 (Bankr. S.D. Ohio 1996). “The enactment of [§ 362(h)] granted
7 bankruptcy courts an independent statutory basis, apart from their contempt power, to
8 order sanctions against violators of automatic stays.” *Crysen/Montenay Energy Co. v.*
9 *Esselen Assocs., Inc. (In re Crysen/Montenay Energy Co.)*, 902 F.2d 1098, 1104 (2d
10 Cir. 1990).

11 Notwithstanding that the courts have traditionally recognized two available
12 remedies for a stay violation (i.e., § 362(k)(1) damages and § 105(a) contempt
13 sanctions), the court must now reevaluate those remedies in light of *Law*. In other
14 words, this court must consider whether the contempt remedy that may have
15 previously been available to the individual can ever go beyond what is recoverable
16 under § 362(k)(1), something that has not been addressed by courts.⁸

17 Contempt sanctions are issued pursuant to § 105(a). *See Dyer*, 322 F.3d at
18 1189–90. While § 105(a) may have far-reaching application, “[i]t is hornbook law
19 that § 105(a) does not allow the bankruptcy court to override explicit mandates of
20 other sections of the Bankruptcy Code.” *Law*, 134 S. Ct. at 1194 (internal quotation
21 marks omitted) (citation omitted). “That is simply an application of the axiom that a
22 statute’s general permission to take actions of a certain type must yield to a specific
23 prohibition found elsewhere.” *Id.* Thus, “it is generally agreed that § 105 is not a
24 roving commission to do equity or to do anything inconsistent with the Bankruptcy
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26 ⁸ This discussion is not intended to address whether *Law* affects the established Ninth
27 Circuit case law, cited above, that permits a non-individual injured by a stay violation to
28 recover civil contempt sanctions under § 105(a), since § 362(k)(1) is not applicable in those
cases.

1 Code.” *Yadidi v. Herzlich (In re Yadidi)*, 274 B.R. 843, 848 (9th Cir. BAP 2002).

2 In this case, the “specific prohibition” lies in § 362(k)(1), as narrowly
3 interpreted by *Sternberg*. Section 362(k)(1) sets forth a comprehensive set of
4 remedies for individuals injured by a willful stay violation, expressly including both
5 mandatory remedies (i.e., “actual damages, including costs and attorneys’ fees”) and
6 discretionary remedies (i.e., “punitive damages”). And, under *Sternberg*, the
7 (mandatory) attorney’s fees included in the damages are limited to those fees incurred
8 before termination of the stay violation. *See* 595 F.3d at 947. Anything that falls
9 outside of what must or may be awarded under § 362(k)(1) would clearly be
10 precluded from recovery, such as attorney’s fees incurred in pursuing the damages
11 award.

12 Although § 362(k)(1) and § 105(a) may appear to offer two distinct remedies,
13 the limitations of § 362(k)(1) must nevertheless guide what can be awarded under
14 § 105(a). This is because “the language of § 105(a) authorizes only those remedies
15 ‘necessary’ to enforce the bankruptcy code.” *Dyer*, 322 F.3d at 1193. Yet, allowing
16 an individual to circumvent § 362(k)(1) and recover more than he or she can
17 otherwise recover under that statute can hardly be considered a “necessary” exercise
18 of § 105(a). As the Ninth Circuit has stated, “[I]t is not up to [the courts] to read other
19 remedies into the carefully articulated set of rights and remedies set out in the
20 Bankruptcy Code.” *Walls*, 276 F.3d at 507. Here, the set of remedies has been
21 articulated by § 362(k)(1), which has prohibited the recovery of certain attorney’s
22 fees.

23 It follows that § 105(a), if used in the way suggested by the Debtor, would be
24 “exercised in contravention of the Code.” *Law*, 134 S. Ct. at 1195. As a result, this
25 court is not persuaded that § 105(a)’s civil contempt authority is available to an
26 individual who seeks to recover the attorney’s fees and costs that are expressly
27 unavailable under § 362(k)(1) and *Sternberg*.

1 **Conclusion.**

2 Based on the foregoing, the court finds and concludes that Golub willfully
3 violated the automatic stay and that the Debtor is entitled to recover his actual
4 damages under § 362(k)(1). The Motion will be granted in part. The Debtor will be
5 awarded his actual damages in the amount of \$3,408.55, which represents \$3,333.50
6 in attorney's fees and \$75.05 in costs incurred prior to termination of the stay
7 violation. The damages award shall be joint and several against respondents Mitchell
8 S. Golub, Esq., and the Law Offices of Golub & Associates, PLC. The part of the
9 Debtor's Motion requesting an award of additional fees as a contempt sanction under
10 § 105(a) will be denied.

11 Dated: May 15, 2014

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13 /s/ W. Richard Lee
14 W. Richard Lee
15 United States Bankruptcy Judge
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